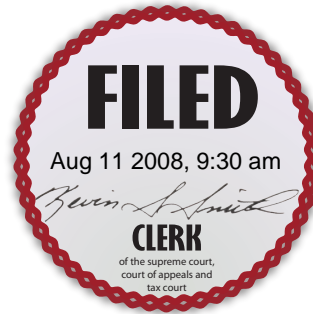


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

FREDDIE MILLS,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 49A05-0801-CR-39

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Steven R. Eichholtz, Judge
Cause No. 49G23-0706-FA-107525

August 11, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Appellant-Defendant Freddie Mills appeals his convictions, following a jury trial, for Class A felony Dealing in Cocaine,¹ Class C felony Possession of Cocaine,² and Class A misdemeanor Possession of Marijuana,³ for which he received an aggregate sentence of thirty years in the Department of Correction. Upon appeal, Mills challenges the trial court's jury instruction defining "possession" and the sufficiency of the evidence to support his convictions for dealing in and possession of cocaine. We affirm.

FACTS AND PROCEDURAL HISTORY

On June 10, 2007, Mills's girlfriend Natalie Kidd agreed to drive Mills from Bloomington to South Bend while Mills's cousin followed in another vehicle. According to Kidd, Mills was carrying cocaine and marijuana when she picked him up. Once inside Kidd's vehicle, Mills smoked a marijuana cigar and placed it in the middle console, and he placed a bag of cocaine in the "outer side of his pocket by the window." Tr. p. 36. During their trip, the parties decided to stop off in Indianapolis.

At approximately 9:00 p.m., Indianapolis Metropolitan Police Officer Kenneth Greer observed two vehicles traveling in tandem westbound on East Market Street against one-way traffic. Officer Greer initiated a traffic stop.

According to Kidd, in response to the traffic stop by police, Mills threw the bag of cocaine into her lap and told her to "stuff it." Tr. p. 37. Kidd stuffed the bag into her

¹ Ind. Code § 35-38-4-1 (2006).

² Ind. Code § 35-48-4-6 (2006).

³ Ind. Code § 35-48-4-11 (2006).

pants. Kidd then threw Mills's baggie of marijuana underneath the seat in an attempt to hide it.

During the traffic stop Officer Greer ascertained Kidd's and Mills's identities and discovered that neither had a valid driver's license. During a subsequent inventory search of the vehicle, Officer Greer discovered a baggie of marijuana underneath the driver's seat, as well as a marijuana cigar. Tests revealed that this marijuana totaled 3.06 grams in weight.

Kidd and Mills were transported to the Arrestee Processing Center (APC) where both of them were searched. The search of Mills turned up nothing. As Marion County Sheriff's Department Corrections Officer Lisa Hawk searched Kidd, however, Kidd began to cry and admitted that she had drugs on her person. Kidd then pulled from her underwear a bag containing two individual baggies and sixteen tiny individual baggies, each containing differing amounts of a substance which was later determined to be cocaine having a total weight of 21.7 grams. Kidd gave the bag to Hawk, and Officer Greer read Kidd her *Miranda* rights. Kidd told Officer Greer that all of the drugs belonged to Mills.

Officer Greer subsequently read Mills his *Miranda* rights, after which Mills said to Greer, "Does this have anything to do with my girlfriend and the contraband they found?" Tr. p. 121. According to Officer Greer, absent independent knowledge of the drugs, there is no way Mills would have known that Kidd had been found in possession of them. In Officer Greer's view, Mills was not in close enough proximity to Kidd to have witnessed the cocaine being found or any discussions relating to its discovery.

According to Indianapolis Metropolitan Police Officer Chris Reid, the quantity of cocaine found in the instant case, specifically 21.7 grams, is consistent with dealing, as is individual packaging of different amounts of cocaine.

On June 12, 2007, the State charged Mills with Class A felony dealing in cocaine (Count I), Class C felony possession of cocaine (Count II), and Class A misdemeanor possession of marijuana (Count III). The jury found Mills guilty as charged, and the trial court entered judgment of conviction on all three counts. During a December 20, 2007 sentencing hearing, the trial court sentenced Mills to concurrent sentences of thirty years in the Department of Correction for Count I, two years executed for Count II, and one year executed for Count III. This appeal follows.

DISCUSSION AND DECISION

I. Jury Instruction

On appeal, Mills first claims abuse of discretion by the trial court and fundamental error based upon Final Jury Instruction No. 11, which defined “possession.” Mills claims that this instruction was a misstatement of law because it did not include the *mens rea* element requiring that the possession be “knowing.” The State responds by claiming that Mills’s challenge to the instruction is waived and that the instruction did not constitute error, much less fundamental error.

A. Waiver

We first address the State’s contention that Mills’s challenge is waived. In order to preserve an alleged error as it pertains to a jury instruction, a party is required to make a timely objection to the proposed instruction. *See Mitchell v. State*, 742 N.E.2d 953, 955

(Ind. 2001). At trial, in discussing Final Instruction No. 11, the State requested that the trial court include the final two paragraphs of the pattern jury instructions defining “possession,” which state that possession can be sole or joint and that it can be actual or constructive. (Tr. 213) *See* Indiana Pattern Jury Instructions—Criminal 14.156 (3d ed. 2007). Defense counsel objected by stating that he believed the instruction was a correct statement of law but that “based on Black’s Law Dictionary definition of constructive possession[,] Definition 1 is control or dominion over a property without actual possession or custody of it. And this instruction paraphrases, adds [an] extra line which I disagree with the phrasing of that.” Tr. p. 215.

Mills now claims that the above language preserves his instant challenge to the instruction, namely that it did not include the *mens rea* of “knowing” as an element of “possession.” Mills agrees that a timely objection requires clear identification of both the claimed objectionable matter and the grounds for the objection. *See Scisney v. State*, 701 N.E.2d 847, 849 (Ind. 1998). Because defense counsel’s objection at trial made no mention of the “knowing” or “*mens rea*” grounds upon which he now challenges the instruction, his claim that the trial court abused its discretion in submitting this instruction is waived.

B. Fundamental Error

Alternatively, Mills claims that Final Instruction No. 11 constituted fundamental error. The fundamental error doctrine has extremely narrow applicability. *See Carter v. State*, 754 N.E.2d 877, 881 (Ind. 2001). A fundamental error is “a substantial, blatant violation of basic principles of due process rendering the trial unfair to the defendant.”

Id. (internal quotation omitted). It applies only when the actual or potential harm “cannot be denied.” *Id.* (internal quotation omitted). The error must be “so prejudicial to the rights of a defendant as to make a fair trial impossible.” *Id.* (internal quotation omitted).

“The purpose of an instruction is to inform the jury of the law applicable to the facts without misleading the jury and to enable it to comprehend the case clearly and arrive at a just, fair, and correct verdict.” *Overstreet v. State*, 783 N.E.2d 1140, 1163 (Ind. 2003). “Instruction of the jury is generally within the discretion of the trial court and is reviewed only for an abuse of that discretion.” *Id.* at 1163-64. In reviewing a trial court’s decision to give or refuse tendered jury instructions, this court considers the following: (1) whether the instruction correctly states the law; (2) whether there is evidence in the record to support the giving of the instruction; and (3) whether the substance of the tendered instruction is not covered by the other instructions given. *Id.* at 1164.

Mills challenges Final Instruction No. 11 under the first prong by claiming that it did not correctly state the law because it lacked the “knowing” element. Final Instruction No. 11 stated the following:

Possession may be either actual or constructive. A person who has direct and physical control over an item has actual possession. A person who has the intent and capability to maintain control over an item has constructive possession. Possession may be sole or joint. If one person alone has actual or constructive possession of a thing, then possession is sole. If two or more persons share actual or constructive possession of a thing, then possession is joint. Possession may be actual or constructive, and either alone or jointly with others.

Mills bases his argument on a Black's Law Dictionary definition of "possession" which includes in its definition the *mens rea* of "knowingly." See Black's Law Dictionary 1047 (rev. 5th Ed. 1979), *cited in Doss v. State*, 470 N.E.2d 732, 733 (Ind. Ct. App. 1984).⁴ We observe that Indiana Pattern Criminal Jury Instruction No. 14.156 similarly includes the *mens rea* of "knowingly" in its definition of "possession":

There are two kinds of "possession"—actual possession and constructive possession. A person who knowingly has direct physical control of a thing at a given time is then in actual possession of it. A person who, although not in actual possession, knowingly has both the power and the intention at a given time to exercise control over a thing, either directly or through another person or persons, is then in constructive possession of it.

Mills further points to *Doss*, wherein this court reversed a defendant's conviction for dealing in a sawed-off shotgun on the grounds that the trial court had failed to specify in the jury instructions that the "possession" element of that offense must be *knowing* "possession." 470 N.E.2d at 733.

Contrary to the offenses in the instant case, however, the offense in *Doss* did not include "knowing" as a specific element of the crime. Indeed, the offense in *Doss* required only that "A person who ... possesses ... any sawed-off shotgun commits dealing in a sawed-off shotgun...." See current Ind. Code § 35-47-5-4.1. Because the definition of "possession" meant "knowing control or custody," it was necessary to provide a jury instruction indicating to jurors that "possession" had to be "knowing." *Doss*, 470 N.E.2d at 733. Here, in contrast, Mills's offenses specified the "knowing"

⁴ The current edition of Black's Law Dictionary does not include the element of "knowing" in its definition of "possession." See Black's Law Dictionary 1201 (8th ed. 2004).

element of his crimes, and the jury, upon receiving instruction as to the elements of the crimes, was apprised of this “knowing” element. Indeed, Final Instructions Nos. 7, 8, and 9 both defined Mills’s crimes in terms of “knowing” possession and also separated the crimes into elements, requiring for each that the jurors find the possession element of each crime to be “knowing.” Accordingly, we conclude *Doss* is fully distinguishable.

To the extent that Final Instruction No. 11 differed from the version in the Pattern Jury Instructions and a Black’s Law Dictionary definition, we reject Mills’s claim of fundamental error. Jury instructions “are to be read together as a whole and not as single units, and a single instruction need not contain all the law applicable to the case.” *Hurt v. State*, 570 N.E.2d 16, 18 (Ind. 1991). As stated above, Final Instructions Nos. 7-9 instructed the jury, with respect to each of Mills’s offenses, that his possession must be “knowing” or “intentional,” and that the State must prove the separate *mens rea* element of “knowingly or intentionally” with respect to each charge to support a conviction. In light of these accompanying jury instructions, any inconsistency between Final Instruction No. 11 and the Pattern Jury Instructions or a Black’s Law Dictionary definition did not constitute a blatant violation of basic due process principles or render Mills’s trial unfair. Accordingly, we find no merit to Mills’s claim of fundamental error.

II. Sufficiency of the Evidence

Mills also challenges the sufficiency of the evidence to support his convictions for dealing in and possession of cocaine. In challenging his convictions on this basis, Mills points out that the cocaine was found on Kidd’s person and claims that Kidd’s allegation that the cocaine was his is incredibly dubious given her clear interest in linking the drugs

to him. Our standard of review for sufficiency-of-the-evidence claims is well-settled. We do not reweigh the evidence or judge the credibility of the witnesses. *Kien v. State*, 782 N.E.2d 398, 407 (Ind. Ct. App. 2003), *trans. denied*. We consider only the evidence which supports the conviction and any reasonable inferences which the trier of fact may have drawn from the evidence. *Id.* We will affirm the conviction if there is substantial evidence of probative value from which a reasonable trier of fact could have drawn the conclusion that the defendant was guilty of the crime charged beyond a reasonable doubt. *Id.* It is the function of the trier of fact to resolve conflicts of testimony and to determine the weight of the evidence and the credibility of the witnesses. *Jones v. State*, 701 N.E.2d 863, 867 (Ind. Ct. App. 1998). A conviction may rest upon the uncorroborated testimony of the victim. *Ludy v. State*, 784 N.E.2d 459, 461 (Ind. 2003).

With respect to Count I, a person who knowingly or intentionally possesses with intent to deliver cocaine commits dealing in cocaine, which qualifies as a Class A felony if the amount equals or exceeds three grams. *See* Ind. Code § 35-48-4-1. With respect to Count II, a person who knowingly or intentionally possesses cocaine commits possession of cocaine, which qualifies as a Class C felony if the amount equals or exceeds three grams. *See* Ind. Code § 35-48-4-6.

Here, Kidd testified that Mills requested that she drive him from Bloomington to South Bend, and that he had the cocaine in his possession, along with marijuana, when she picked him up. The cocaine, totaling over twenty-one grams in weight, was separately packaged in eighteen smaller baggies containing differing amounts. Trial

testimony established that both the amount of cocaine and its packaging are consistent with dealing in cocaine.

When Kidd was stopped by authorities, Mills threw the bag of cocaine on her lap and requested that she hide it. Kidd cried when authorities searched her, volunteered that she was in possession of the drugs, and willfully handed them over. Mills, who would have been unable to observe Kidd do this, nevertheless asked authorities about the drugs, demonstrating his independent knowledge of their existence. Kidd testified that Mills supported himself by selling cocaine and that he had admitted selling drugs.

Furthermore, Mills's challenge to his conviction based upon what he claims was the incredible dubiousity of Kidd's version of the events is simply an invitation to reweigh the evidence, which we decline to do. While a reviewing court will impinge upon the fact-finder's credibility judgments when confronted with testimony of inherent improbability, or coerced, equivocal, wholly uncorroborated testimony of incredible dubiousity, this exception applies only where a single witness testifies and there is a complete lack of circumstantial evidence of guilt. *Bowles v. State*, 737 N.E.2d 1150, 1152 (Ind. 2000). Here, Kidd was only one of several witnesses to testify in the State's case against Mills. In addition, Officer Greer's testimony regarding Mills's incriminating statement corroborated Kidd's testimony, as did testimony by Detective Chris Reid indicating that it is common for drug dealers to travel with companions to create distance and plausible deniability if drugs are discovered. Accordingly, we conclude Mills's challenge to the sufficiency of the evidence supporting his convictions for dealing in and possession of cocaine is without merit.

Having concluded that Final Jury Instruction 11 did not constitute fundamental error and that Mills's convictions are supported by sufficient evidence, we affirm the judgment of the trial court.

The judgment of the trial court is affirmed.

RILEY, J., and BAILEY, J., concur.